



**DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
ENFORCEMENT DIVISION
*DIRECTIVE***

**DIRECTIVE
NUMBER
218**

**DISTRIBUTION
DATE
October 1, 1998**

1. **SUBJECT: DISABILITY COMPLAINTS - SPECIAL CONSIDERATIONS**
2. **PURPOSE:** To set forth the procedures for facilitating the intake and investigation of disability complaints.
3. **BACKGROUND:** In 1993 significant changes were made to the Fair Employment and Housing Act (FEHA) to bring it into conformance with the Federal Americans With Disabilities Act (ADA). Prior to 1993, the FEHA used the word "handicap." In 1993 that term was replaced with "disability." In addition, provisions were added to the FEHA to include mental disabilities, alcoholism, and prior drug addiction as disabilities covered by the FEHA.

Complaints alleging physical or mental disability discrimination, or perceived physical or mental disability discrimination, require extra attention during intake such as ensuring that key information regarding complainant's disability and any Workers' Compensation issues are obtained, along with completed medical releases. It is also necessary to ensure that critical evidence is gathered during the investigation, including specific information regarding the essential duties or requirements of the position and all relevant medical evidence.

4. **PROCEDURES:**

- A. **Intake:**

Where a complainant alleges that an adverse employment action occurred because of his/her disability or respondent's perception of a disability, the intake of the complaint is to be handled as follows:

- 1) The complainant will complete the "Supplemental Disability Information" (DFEH-600-04H). The intake Consultant will ensure that the complainant completes the Workers' Compensation section of the form. Where the complainant has not filed a Workers' Compensation claim, but intends to do so, a notation of such will be included in the intake notes.

- 2) The complainant will sign in ink at least one "Medical Release" (DFEH-600-27) for **each** physician or medical practitioner listed on the Supplemental Information form, as well as the "Authorization For Release of Work-Related Information" (DFEH-600-11).
- 3) The intake Consultant will accurately identify the nature of the physical or mental condition in question as well as the specific employment opportunity that was denied the complainant or the specific nature of the adverse action taken against the complainant.
- 4) Because the FEHA encompasses the provisions of the ADA, it may allow for limited **medical insurance benefits** for persons who are disabled. (Refer to the "Insurance and Benefits" section of the Disability section of the Case Analysis Manual [pp. 81-83] for details). The assigned attorney will be consulted in instances where a complainant alleges he/she was denied medical insurance or had limitations placed on his/her medical insurance because of a disability.

B. Investigation:

The investigation of disability cases will be conducted in accordance with the guidelines and legal standards set forth in the Disability section of the Case Analysis Manual. There are, however, several important issues which should be examined in order to ensure that a proper investigation is conducted. Some of these issues are:

- 1) Determining the essential job duties and physical or mental requirements of the job in question. Consultants should not rely solely on the information a respondent has presented. Talking with others who hold or have held the job in the past is a good way to ascertain whether the respondent's stated duties and requirements of the position are accurate.
- 2) Discussing with the complainant the jobs he/she is currently performing or has performed in the past, especially those that may have the same duties or requirements of the position in question. Consultants should obtain the dates and approximate time spent in such positions, and identify any problems the complainant may have experienced while performing the position(s).
- 3) Gathering **all** of the relevant medical evidence. All medical practitioners who have information relevant to the case should be contacted. Consultants should ensure that the information includes the qualifications of the medical practitioner responding and the extent of their examination of the complainant. Obtain written medical records and copies of the complainant's medical files.

C. Workers' Compensation Considerations:

When investigating cases where the complainant has also filed a Workers' Compensation Act (WCA) claim, Consultants should be aware of the following:

- 1) Respondents may raise issues challenging Department of Fair Employment and Housing (DFEH) jurisdiction over disability complaints when the disability stems from a work-related injury. The Supreme Court, in its decision in the City of Moorpark v. Superior Court of Ventura County, (1998) 18 Cal.4th 1143, 77 Cal.Rptr. 2d 445, has ruled disability complaints that result from work-related injuries are not preempted by the WCA.
- 2) In any disability case where the complainant has filed a concurrent Workers' Compensation case, Consultants should always review the complainant's Workers' Compensation file prior to forwarding the case to Legal for possible accusation. Consultants may obtain information about Workers' Compensation by contacting the Information and Assistance Officer at the local Workers' Compensation Appeals Board which services their geographic area.
 - a) Where the complainant has litigated his/her case before the Worker's Compensation Appeals Board, the files are public records. Consultants may review these files by contacting the local Information and Assistance Officer.
 - b) Where a Workers' Compensation case has not been litigated, Consultants may have to subpoena the records from the Custodian of Records of the local office where the case was filed.
- 3) Recipients of temporary Workers' Compensation benefits frequently return to work with a permanent percentage disability rating. This rating does not mean that the individual has a specific loss of function. It is used to determine the amount of monetary benefits the individual will receive. These ratings are not, in themselves, a defense to charges of disability discrimination. Consultants should investigate the underlying medical opinions which gave rise to the ratings.
- 4) A complainant may sign a Workers' Compensation settlement agreement that also contains language waiving other claims. This does not automatically bar the complainant from receiving a remedy under the FEHA. However, the assigned attorney should be consulted regarding the effect of the agreement.
- 5) A respondent may wish to insert language within a DFEH settlement agreement that expressly releases the respondent from a Workers'

Compensation claim or liability. Such language *is not* to be included in DFEH agreements. The complainant should be advised that he/she may sign a separate agreement with the respondent to settle the Workers' Compensation claim. DFEH will not be a party to this separate agreement. The complainant should be instructed to address his/her concerns about the Workers' Compensation settlement with his/her private attorney or to the Workers' Compensation Appeals Board.

If a complainant wishes to settle a DFEH charge without affecting his/her Workers' Compensation claim, the following language must be added to the agreement:

" The complainant expressly reserves the right to pursue his/her Workers' Compensation Claim #____."

- 6) Physical disability complaints are not the only complaints that may be affected by companion Workers' Compensation cases. The guidelines discussed above apply to all cases in which a review of Workers' Compensation files is warranted (e.g., a harassment case in which the complainant has sought Workers' Compensation benefits).

5. **APPROVAL:**

Nancy C. Gutierrez, Director

Date